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Section 64 of the *Property Law Act 1974 (Qld)* and the Reluctant Buyer

The decision of the Court of Appeal in *Dunworth v Mirvac Qld Pty Ltd* [2011] QCA 200 arose from unusual circumstances associated with the flood in Brisbane earlier this year.

Maris Dunworth ('the buyer') agreed to purchase a ground floor residential apartment located beside the Brisbane River at Tennyson from Mirvac Queensland Pty Ltd ('Mircvac'). The original date for completion was 12 May 2009. In earlier proceedings, the buyer had alleged that she had been induced to purchase the apartment by false, misleading and deceptive representations. This claim was dismissed and an order for specific performance was made with a new completion date of 8 February 2011.

As part of widespread flood damage in Brisbane, the apartment in question was inundated by flood water on or about 13 January 2011 such that it was unfit for occupation as a dwelling. On the 24th of January 2011, Mirvac offered to undertake the work necessary to restore the apartment. A measure of the damage occasioned by the flooding was that Mirvac's offer contemplated that it would take four months to complete the work. Mirvac's offer to restore was rejected by the buyer. On 28 January 2011, the buyer purported to rescind the contract on the basis that the apartment was unfit for occupation as a dwelling house. In exercising this alleged right of rescission, the buyer placed reliance upon s 64 of the *Property Law Act 1974 (Qld)*. That section provides:

64 Right to rescind on destruction of or damage to dwelling house

(1) In any contract for the sale of a dwelling house where, before the date of completion or possession whichever earlier occurs, the dwelling house is so destroyed or damaged as to be unfit for occupation as a dwelling house, the purchaser may, at the purchaser's option, rescind the contract by notice in writing given to the vendor or the vendor's solicitor not later than the date of completion or possession whichever the earlier occurs.

(2) Upon rescission of a contract under this section, any money paid by the purchaser shall be refunded to the purchaser and any documents of title or transfer returned to the vendor who alone shall be entitled to the benefit of any insurance policy relating to such destruction or damage subject to the rights of any person entitled to the insurance policy because of an encumbrance over or in respect of the land.

(3) In this section—

sale of a dwelling house means the sale of improved land the improvements on which consist wholly or substantially of a dwelling house or the sale of a lot on a building units plan within the meaning of the *Building Units and Group Titles Act 1980* or the sale of a lot included in a community titles scheme under the *Body Corporate and Community Management Act 1997* if the lot—

(a) wholly or substantially, consists of a dwelling; and

(b) is, under the *Land Title Act 1994*—

(i) a lot on a building format plan of subdivision; or

(ii) a lot on a volumetric format plan of subdivision, and wholly contained within a building.

(4) This section applies only to contracts made after the commencement of this Act and shall have effect despite any stipulation to the contrary.

Having purported to rescind, the buyer applied for a declaration that the rescission of the contract was valid and for dissolution of the order for specific performance. At first instance, the primary judge extended the time for completion until the 8th of June 2011 and made orders to facilitate trial of the issues raised.

On appeal, the main issue for determination was a relatively limited question of construction. The question was whether the statutory right of rescission provided by s 64 could subsist beyond the date that had been contractually appointed for completion where there was a later paramount specific performance order. It was conceded by Mirvac, for the purposes of s 64, that the apartment was unfit for occupation as a dwelling house.

Decision of the Court of Appeal

The Court of Appeal (de Jersey CJ, McMurdo and Dalton JJ) held that the buyer had validly rescinded the contract.

de Jersey CJ (with whom Dalton J agreed) did not consider it necessary to analyse in detail the competing contentions made by counsel which focused on the significance of the court's imposition of the date for completion by means of the order for specific performance, in the context of the contractually agreed date for completion. Rather, de Jersey CJ preferred the view that the natural construction of the statutory words "before the date of completion or possession" meant the earlier of the date of actual completion or possession. Supporting this construction, was the reference in s 64 to a date "of", rather than "for", completion or possession, suggestive of a reference to a date of actual completion, or the actual taking of possession. In this regard, de Jersey CJ opined (at [30]):

The apparent objective of this beneficial provision is to accord relief to a purchaser where, without fault on his or her own part, the subject matter of an uncompleted contract is rendered unfit for the purpose. Consistently, ... [this is] ...textually preferable: if prior to actual completion or possession the premises are rendered unfit in that way, the purchaser gains a right of rescission.

The submission that this construction rewarded a wrong-doing by the buyer was considered by de Jersey CJ to be unfounded. Any benefit that the buyer gained from the exercise of the statutory right of rescission was simply the consequence of the operation of remedial legislation.

McMurdo J also agreed that the expression "date of completion" in s 64 should be construed as the date of actual completion. In terms of the evident policy purpose of s 64 being to protect buyers and to shift, to the seller, the risk of a house becoming unfit for occupation after the contract is made, McMurdo J opined (at [53]):

The most likely intention, which is consistent with the words used, is that this alteration of the risk in favour of purchasers should remain in place notwithstanding the passage of the agreed date for completion. The burden of this risk upon the vendor is made an element of the contractual relationship for as long as the contract remains on foot.

Comment

In this instance, the reluctant buyer was the beneficiary of an unforeseen disaster but the situation could not correctly be classified as a situation where the buyer was taking advantage of her own wrong. Notwithstanding the buyer's earlier unsuccessful attempt to avoid the contract on other grounds, the decision of the Court of Appeal reflects the expected consequence of a statutory right of rescission that is intended to facilitate consumer protection notwithstanding that it was triggered by circumstances that were anything other than expected.

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